Petition

Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL P. LANE, DIRECTOR,
ILLINOIS DEPARTMENT OF CORRECTIONS,

PETITIONER,

v.

EDDIE ALLEN,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with this Court's decisions in *Jenkins v. Anderson*, *Raffel v. United States* and *Doyle v. Ohio* and thereby goes far beyond any due process requirements pertaining to a prosecutor's comments upon a defendant's pre-trial silence.

II.

Assuming *arguendo*, that the prosecutor impermissibly commented upon the respondent's pre-trial silence in violation of *Doyle v. Ohio*, whether such comments were harmless beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the Court of Appeals, as to which review is being sought, is attached to this Petition as Appendix A. This opinion is also reported as *United States ex rel. Allen v. Franzen*, 659 F.2d 745 (7th Cir. 1981).[1]

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[1] Petitioner Lane has been substituted for Gayle Franzen, the former Director of the Illinois Department of Corrections. Thaddeus Pinkney, an additional respondent below, is no longer employed as the Warden of the Pontiac Correctional Center and counsel has therefore removed him as a named party to this proceeding. *See* Supreme Court Rule 21.1(b).

A prior opinion by the Court of Appeals, which incorporated the District Court's decision and order, may be found at 591 F.2d 391 (7th Cir. 1979). This prior decision was vacated by this Court in *Franzen v. Allen*, 447 U.S. 917 (1980) and remanded to the Court of Appeals for further consideraton in light of *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Respondent's original conviction was affirmed, on direct appeal, by the Illinois Appellate Court in *People v. Allen*, 37 Ill. App. 3d 619, 346 N.E.2d 486 (3d Dist. 1976). The Illinois Supreme Court denied respondent leave to appeal and this Court denied his Petition for Writ of Certiorari. *Allen v. Illinois*, 430 U.S. 956 (1977).

JURISDICTION

The Court of Appeals decision was rendered on August 27, 1981. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 9, 1981, by a 5 to 3 vote of the full Court of Appeals. See Appendix B. This Petition is being filed within 90 days of the latter date. Stern and Gressman, *Supreme Court Practice*, 398-400 (5th ed. 1978). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

This case revolves around certain questions asked by the prosecutor during cross-examination and statements made by him during the closing argument at respondent's trial for murder. Respondent alleges that those questions and comments violated his fifth and fourteenth amendment rights, as delineated in *Doyle v. Ohio*, 426 U.S. 610 (1976), because they constituted an impermissible use of his pre-trial silence for impeachment purposes.

Respondent was convicted of murder and sentenced on June 21, 1974, to a term of 18 to 50 years. That conviction was affirmed by the Appellate Court of Illinois in *People v. Allen*, 37 Ill. App. 3d 619, 316 N.E.2d 486 (1976). Leave to appeal to the Illinois Supreme Court was denied, and this Court denied respondent's Petition for Writ of Certiorari. 430 U.S. 956 (1977). Respondent then sought a writ of habeas corpus from the United States District Court, Southern District of Illinois, alleging the same ground as he had alleged on direct appeal. The writ was granted on July 24, 1978, and that decision was affirmed by the Court of Appeals for the Seventh Circuit on January 8, 1979. *United States ex rel. Allen v. Rowe*, 591 F.2d 391 (7th Cir. 1979).

This Court vacated that judgment and remanded the case to the Court of Appeals for further consideration in light of *Jenkins v. Anderson*, 447 U.S. 231 (1980). The Court of Appeals, once again, affirmed the District Court's grant of habeas corpus relief. *United States ex rel. Allen v. Franzen*, 659 F.2d 745 (7th Cir. 1981). A subsequent Petition for Rehearing or Rehearing En Banc was denied by a 5 to 3 vote of all active Circuit Judges. See Appendix B. It is from this latter decision of the Court of Appeals that petitioner now seeks certiorari.

Factually, it is undisputed that the respondent, Eddie Allen, shot and killed his wife on January 3, 1974, at the home

of Margaret and Daniel Moore where Mrs. Allen was living, having separated from her husband. At trial, Mrs. Moore testified that Allen had arrived at her house and she had left the living room so Mr. and Mrs. Allen could talk. Mrs. Moore then heard Mrs. Allen run down the hall to the back door screaming that Allen had a gun. Allen caught his wife at the back door, at which point Mrs. Moore heard a sound like a blow or a crash. Mrs. Moore went to the back door and noticed that Mrs. Allen was bleeding from the back of her head.

Allen testified that while Mrs. Moore was out of the living room he had told his wife he knew of her discussions with two men about having him killed. At this point, Allen testified, his wife ran into the kitchen and grabbed a butcher knife. A struggle then took place. Allen claimed that his wife struck her head on the back door. Human blood, however, was found on Allen's handgun.

After this incident, Mr. and Mrs. Allen returned to the living room and Mrs. Moore began to telephone her husband from the kitchen where she could see the Allens. Mrs. Allen was sitting on a chair and Eddie Allen was kneeling in front of her. Mrs. Moore saw Mrs. Allen attempt to rise from the chair at the time Eddie Allen started to shoot. After shooting five times, Allen took a step toward his wife, who was by now laying on the floor, pointed the handgun and attempted to fire the then empty weapon. Allen then said, "She is dead now. Call the police." Mrs. Moore was unable to make the call, so Allen notified the police.

Allen testified at trial that while he and his wife were in the living room she told him that if she got the chance she would kill him herself. He was nervous and reached into his pocket for a cigarette. Mrs. Allen then allegedly said something about there being a gun in his pocket and Allen testified she reached for her purse. Allen said he remembered jumping up and pulling the trigger of his gun once but did not recall firing

any other shots or pointing the empty gun at his wife's body and pulling the trigger.

Allen stated that he thought his wife had a gun or knife in her purse and that he was "scared to death". He claimed that the purse was beside the chair on which his wife sat. Mrs. Moore testified, however, that both Mrs. Allen's purse and coat were in the kitchen by the back door. Photographs of the murder scene which were introduced at trial corroborated the testimony that the purse which Allen feared contained a gun was in the kitchen and not in the living room.

When the police arrived at the house, Allen met one of the officers at the sidewalk. The officer asked what had happened and Allen replied, "I shot my wife." Allen told the officer that the gun was on the table in the house and that his wife was "hurt pretty bad."

The police officer testified that Allen appeared very calm while making these statements. The officer then entered the Moore house and attempted to give first aid to Mrs. Allen. Subsequently, Allen was placed under arrest and, after being given his *Miranda* warnings, he apparently made no further statements.

Respondent, both on direct appeal and in the habeas corpus proceeding, complained of the following colloquy on cross-examination:

> Q: [State's Attorney] Would you explain what information you gave to Officer Terry Melloy concerning your fears for your life and efforts of self defense when he came up to the house after you called?

An objection to the question was sustained.

> Q: [State's Attorney] Now, Mr. Allen, when the police show [sic] up pursuant to your call on January 3,

1974, at 431 West 7th in Peoria, and you talked to Officer Melloy, you never mentioned any fear for your life did you?

DEFENSE COUNSEL: Same Objection.
THE COURT: Overruled.

A: Would you repeat the questions?

Q: When the police showed up at 431 West 7th on Janaury 3, 1974 pursuant to your call, you never told them you were in fear for your life from your wife did you?

A: No.

Q: In fact, you never told any law enforcement officer this did you?

A: No, I didn't.

Q: In fact, the first statements regarding this are from the stand in this trial aren't they?

An objection was overruled and a mistrial was denied.

A: Yes.

Respondent also complains of the following statements made during the prosecutor's closing argument:

Now, when by the way, did the defendant first say self-defense? Did he say this of officer Terry Melloy [the first officer to arrive at the crime scene], I just shot my wife, I had to do it, she came at me with a knife in the kitchen! Did he say that? Did he say, she was going into her purse, I thought she had a gun I had to shoot her! Or did he even say, I shot my wife in self-defense. No, none of those. He said very calmly according to Officer Melloy, I just shot my wife, she is pretty bad, she is in there, the gun is on the table. In a calm way.

After he shot his wife five times and stood over her [indicating] and sent the hammer home on an empty

> cylinder, did he then say, oh my God, I had to do it, I thought she was going for a gun. No, what he said was, she's dead now. The defendant could not say self-defense because there was no self-defense. The defendant is a cold blooded, brutal murderer.

Defense counsel objected to these questions and statements at trial, alleging they violated respondent's right to remain silent. The objections were overruled. The jury later convicted Allen of murder. Allen then appealed citing, among other things, the questions and statements objected to at trial.

As previously noted, the Illinois Appellate Court affirmed the conviction, rejecting Allen's argument that *United States v. Hale*, 422 U.S. 171 (1976), *Doyle's* precursor, was applicable under the facts of the case. *People v. Allen*, 37 Ill. App. 3d 619, 346 N.E.2d 486 (3d Dist. 1976). That court held that Allen's pre-arrest statements and conduct were inconsistent with allegations made at trial concerning his state of mind at the time of the murder and that Allen could not foreclose relevant inquiry into those matters on cross-examination. This Court denied certiorari (after *Doyle* was decided and cited by Allen in his petition). The District Court and Court of Appeals, however, disagreed with the state court's determination. They held the references to be comments on what Allen did not say and, therefore, a comment on his silence. Petitioner now brings this Petition for Writ of Certiorari seeking reversal of the District Court's decision granting a writ of habeas corpus and the Court of Appeals' affirmance of that decision.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS IN *JENKINS V. ANDERSON, RAFFEL V. UNITED STATES* AND *DOYLE V. OHIO* AND THEREBY GOES FAR BEYOND ANY DUE PROCESS REQUIREMENTS PERTAINING TO A PROSECUTOR'S COMMENTS UPON A DEFENDANT'S PRE-TRIAL SILENCE.

The majority opinion in the Court of Appeals finds that this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), controls the outcome of this case rather than the later decision in *Jenkins v. Anderson*, 447 U.S. 231 (1980). In so doing, petitioner submits that the Seventh Circuit has unduly expanded the strictures of *Doyle*; clearly misapprehended the decision in *Jenkins*; and misinterpreted the significance of the prosecutor's questions and comments in the case at bar. For these reasons, petitioner believes that this Court should grant certiorari in order to reiterate the limited context to which *Doyle*, rather than *Jenkins*, is applicable.

The *Doyle* decision is a narrow one, limited to certain factual situations. *Doyle* held that a prosecutor may not impeach a defendant's exculpatory story, first revealed at trial, by cross-examination concerning the defendant's failure to tell the same story *after* his arrest and *after* receiving *Miranda* warnings. *Doyle* only governs those situations where an accused is silent upon receiving *Miranda* warnings *at the time of arrest*. This Court clearly noted that its decision did not reach an accused's silence in other post-arrest, pre-trial settings. *Doyle v. Ohio*, 426 U.S. at 616 n. 6. Moreover, this Court's

subsequent decision in *Jenkins* made clear that *Doyle* was to be limited to its factual context.

The District Court's decision and the first decision of the Seventh Circuit went far beyond the *Doyle* holding so as to encompass pre-arrest, pre-*Miranda* silence. The *Jenkins* decision made clear that this was not this Court's intent when it decided *Doyle* and therefore the Court of Appeals' first ruling was vacated and this case was remanded for further consideration in light of *Jenkins*. *Franzen v. Allen*, 447 U.S. 917 (1980). Upon remand, the Seventh Circuit again affirmed the grant of habeas corpus relief. However, this time the court specifically concluded that "[T]he prosecutor's remarks were phrased broadly, without distinguishing between pre-and post-arrest silence." *United States ex rel. Allen v. Franzen*, 659 F.2d at 748.[2]

Petitioner submits that a careful reading of the trial transcript reveals that much of the prosecutor's questions and all of his closing argument clearly referred to the respondent's pre-arrest, pre-*Miranda* period and were therefore permissable under *Jenkins*. (Statement of the Case, *supra* at S-7) *Jenkins v. Anderson*, 447 U.S. at 240-41. Indeed, nowhere did the prosecutor specifically mention the respondent's silence at the time of his arrest and at the time he received the *Miranda* warnings. Petitioner submits that the prosecutor's broad references to general pre-trial silence are not forbidden by the rule of *Doyle*. *Doyle* is not applicable to the total pre-trial period; as noted earlier, it only controls the time period immediately after a defendant's arrest and the giving of the *Miranda* warnings.

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[2] Judge Pell, who concurred in the original decision of the Court of Appeals, strongly dissented from its latest decision. 659 F.2d at 748-50.

Petitioner maintains that general references to pre-trial silence are legitimatized by the rationale of *Jenkins* and *Raffel v. United States*, 271 U.S. 494 (1926). In *Jenkins*, this Court noted that "[C]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins*, 477 U.S. at 239.

Raffel "[R]ecognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence [at a prior trial]." *Jenkins*, 447 U.S. at 235. Thus, not all comments upon pre-trial silence violate the federal constitution.

In the instant case, the prosecutor properly impeached the respondent with his failure to mention his self-defense claim either before his arrest (when he volunteered information to the police) or at any time prior to trial. Only by concluding that the latter remarks referred to the time period just after arrest was the Court of Appeals able to say that a *Doyle* violation had occurred. *United States ex rel. Allen v. Franzen*, 659 F.2d at 747-48. In so doing, the court unreasonably expanded the *Doyle* holding to cover factual circumstances which are actually controlled by the decisions in *Jenkins* and *Raffel*. Since the two questions of the prosecutor which did not clearly refer to respondent's pre-arrest silence also did not specifically refer to the immediate post-arrest, post-*Miranda* time period, the Court of Appeals decision was incorrect and in conflict with prior decisions of this Court. In view of the fact that the decision occurred in the context of a habeas corpus petition in a case which has twice been before this Court without relief being granted to the respondent, it is respectfully submitted that this Petition for Writ of Certiorari be granted and the lower courts' decisions be reversed.

II.

ASSUMING *ARGUENDO*, THAT THE PROSECUTOR IMPERMISSIBLY COMMENTED UPON THE RESPONDENT'S PRE-TRIAL SILENCE IN VIOLATION OF *DOYLE V. OHIO*, ANY ERROR WAS, AT MOST, HARMLESS BEYOND A REASONABLE DOUBT.

The Court of Appeals concluded that three of the questions asked of the respondent at his trial impermissibly referred to post-arrest silence. 659 F.2d at 747-748.[3] The Court further concluded that the error was not harmless since:

> [I]t is possible that a juror might have considered the prosecutor's remarks about petitioner's silence in rejecting his self-defense claim. Further, petitioner's assertion of self-defense was not frivolous; he presented other witnesses who testified about prior attacks and threats . . . by his wife.

659 F.2d at 748.

However, even a cursory review of the facts (*See* Statement of the Case, *supra*) shows that the majority's view was incorrect. As Judge Pell noted in his dissent:

> The overall evidence . . . presents a powerful case of guilt and it would indeed be a strange jury that would find the claim of self defense on this evidence other than frivolous.

659 F.2d at 750.

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[3] The Court of Appeals, at least implicitly, acknowledged that *Jenkins* controlled the prosecutor's question concerning pre-arrest silence as well as the prosecutor's comments during closing argument. However, it found the remaining three questions to be "phrased broadly" and clearly "referring to both . . . pre- and post-arrest silence." 659 F.2d at 748 n.2.

Judge Pell noted that respondent shot his wife five times and then tried to shoot her once more as she was laying on the floor. 659 F.2d at 750. The eyewitness to the shooting testified that she did not own a butcher knife nor did she see a knife on the floor in either the kitchen or the living room.[4] Respondent testified that he shot his wife when she reached for her purse, thinking that she was going for a gun or other deadly weapon. However, photographs of the murder scene corroborated the eyewitness' testimony that the victim's purse was in the kitchen, far removed from the living room where the crime occurred. Finally, respondent was calm when he talked to officer Melloy upon the policeman's arrival at the house.

Judge Pell also noted that:

> It must be kept in mind that under *Jenkins*, if this old case should now be retried, assuming that the Moores and the police officer are still living and are available as witnesses, the prosecution will be free to comment on pre-arrest silence. I feel confident that the prosecution will do so. The jury will know that when the police officer, Melloy, arrived at the scene, Allen did talk to him before a *Miranda* warning was given, and told him that he had shot his wife and that she was hurt "pretty bad," and that he did not say anything about having acted in his own defense. The prosecutor would be perfectly free under *Jenkins* to make comments during final argument to the effect that the natural thing would have been when the officer arrived for Allen to have told the officer that his wife had been after him with a knife and that he had to shoot her. We would not expect him to use terms of art, or that he would tell the policeman *in haec verba* that he was engaged in self defense, but on the other hand it would be wholly natural and probable if he in

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[4] Respondent had testified that his wife had earlier attacked him with a butcher knife and had injured herself during that attack.

> fact had been defending himself he would have made some minimal reference to the actual facts of self defense such as, "she came lunging at me with a butcher knife."

659 F.2d at 749.

Petitioner submits that a *Doyle* violation can be found to be harmless. *See Doyle v. Ohio,* 426 U.S. at 620-21. As can be seen from the facts recited above, as well as those found in the Statement of the Case *supra*, it is clear that the jury could have reached no conclusion other than that respondent's state of mind at the time of the murder was not as he alleged at trial. Even without the offending questions the evidence of respondent's guilt was overwhelming.

When viewed in the context of the trial, the harmlessness of any constitutional violation is inescapable. Indeed, review of the closing argument shows that the prosecutor only sought to prove the inconsistency of respondent's spontaneous conduct and statements with those of a man who had been in desperate fear for his life.

The prosecutor noted that despite respondent's alleged emotional state he had talked very calmly to the police. When he shot his wife he didn't say, "Oh my God, I had to do it, I thought she was going for a gun." He simply said, "She's dead now." Subsequent closing argument went on to demonstrate the incredibility of respondent's defense and did not refer to respondent's failure to give an exculpatory statement prior to trial. Isolated from the totality of the trial the challenged questions may arguably appear egregious. When viewed within the context of the trial as a whole, however, they take on a different character. Even if improper, the questions were at most mild, ambiguous, and harmless beyond a reasonable doubt. *United States v. Mireles,* 570 F.2d 1287 (5th Cir. 1978).

In light of the minimal emphasis placed on respondent's failure to make any exculpatory statements prior to trial; the obvious implausibility of his self-defense theory; and the overwhelming evidence of his guilt, this Court must reach the conclusion that any error committed at trial was harmless beyond a reasonable doubt. This Court should therefore grant this Petition for Writ of Certiorari and reverse the lower courts' decisions.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the Court of Appeals' decision which affirmed the District Court's grant of habeas corpus relief to the respondent.

Respectfully submitted,

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February 17, 1982.

Appendix

In The
United States Court of Appeals
For The Seventh Circuit

No. 78-2140

UNITED STATES OF AMERICA ex rel. EDDIE ALLEN, *Petitioner-Appellee,*

v.

GAYLE M. FRANZEN, Director, Department of Corrections, and THADDEUS PINKNEY, Warden, Pontiac Correctional Center,

Respondents-Appellants.

On Remand from the Supreme Court of the United States, *sub nom., Franzen v. Allen,* No. 78-1531.

AUGUST 27, 1981

Before LAY, *Chief Judge,* * and SWYGERT, *Senior Circuit Judge,* and PELL, *Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Petitioner Eddie Allen was convicted of murder in a jury trial in Peoria County, Illinois, and was sentenced to a prison term of eighteen to fifty years. The conviction was affirmed by the Illinois Appellate Court, Third Judicial District, *People v. Allen*, 37 Ill. App. 3d 619, 346 N.E.2d 486 (1976). The Illinois Supreme Court denied Allen leave to appeal, and the United States Supreme Court denied his petition for writ of certiorari, *Allen v. Illinois*, 430 U.S. 956 (1977).

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* The Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

On February 8, 1978, Allen filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Illinois. The court granted the habeas petition, vacated petitioner's conviction, and allowed the State ninety days to retry or release him. The State appealed on August 16, 1978; the district court stayed its order pending the appeal. We affirmed the decision of the district court, *United States ex rel. Allen v. Rowe*, 591 F.2d 391 (7th Cir. 1979), *vacated sub nom. Franzen v. Allen*, 447 U.S. 917 (1980). The Supreme Court vacated our judgment and remanded the case to us for further consideration in light of *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Under our Circuit Rule 19, the parties have briefed the issue that is before this court on remand: whether the prosecutor's cross-examination of a criminal defendant about his failure to tell his exculpatory story to police upon his arrest constituted reversible error. We conclude that, in the circumstances of this case, the prosecution's attempt to impeach petitioner's testimony by his silence was unconstitutional, and accordingly, we affirm the judgment of the district court.

I

Petitioner shot and killed his wife on January 3, 1974. Officer Terry Melloy of the Peoria Police Department was sent to investigate following Allen's call to the police. When asked by Melloy what happened, Allen replied, "I shot my wife." Allen then told Melloy that the gun was on the table inside the house, and that Mrs. Allen was hurt "pretty bad." Officer Melloy read Allen the *Miranda* warnings, which included the statement that "anything you say can and will be used against you in a court of law." Petitioner acknowledged that he understood his rights and made no further statements.

At trial, Allen contended that he had acted in self-defense. The prosecutor, over the objections of defense counsel, cross-examined Allen about his failure to tell his story to the police:

> "Q: Would you explain that [sic] information you gave to Officer Terry Melloy concerning your fears for your life and efforts of self defense when he came up to the house after you called?"

The trial judge sustained defense counsel's objection to this question and instructed the jury to disregard it.

> "Q: Now, Mr. Allen, when the police showed up pursuant to your call on January 3, 1974, at 431 West 7th in Peoria, and you talked to Officer Melloy, you never mentioned any fear for your life did you?
>
> DEFENSE COUNSEL: Same Objection.
>
> THE COURT: Overruled.
>
> A: Would you repeat the question?
>
> Q: When the police showed up at 431 West 7th on January 3, 1974 pursuant to your call, you never told them you were in fear of your life from your wife did you?
>
> A: No.
>
> Q: In fact, you never told any law enforcement officer this did you?
>
> A: No, I didn't.
>
> Q: In fact, the first statements regarding this are from the stand in this trial aren't they?"

Out of the presence of the jury, defense counsel objected to this line of questioning on the ground that it was improper for the prosecutor to question defendant about his refusal to make a statement, and asked the court to declare a mistrial. The court overruled the objection and denied the motion for a mistrial.

> "Q: Would you repeat the question?
>
> COURT REPORTER: In fact, the first statements regarding this are from the stand in this trial aren't they?
>
> A: Yes."

The prosecutor also commented on Allen's silence during closing arguments to the jury:

> Now, when by the way, did the defendant first say self-defense? Did he say this to officer Terry Melloy, I just shot my wife, I had to do it, she came at me with a knife in the kitchen! Did he say that? Did he say, she was going into her purse, I thought she had a gun, I had to shoot her! Or did he even say, I shot my wife in self-defense. No, none of these. He said very calmly, according to Officer Melloy, I just shot my wife, she is pretty bad, she is in there, the gun is on the table. In a calm way.
>
> * * *
>
> After he shot his wife five times and stood over her and sent the hammer home on an empty cylinder, did he then say, oh my God, I had to do it, I thought she was going for a gun. No, what he said was, she's dead now. The defendant could not say self-defense because there was no self-defense. The defendant is a cold blooded, brutal murderer.

At trial, conflicting evidence was presented on the question of self-defense. Petitioner testified that on the day of the shooting, Mrs. Allen got a butcher knife and a struggle ensued. He also alleged that just before he pulled out his gun and shot her, she had reached into her purse and started to get up; he stated that he thought she was trying to kill him. Mrs. Moore, who was in the house at the time of the shooting, testified that Mrs. Allen did not have her purse in the room at the time of the shooting.

Other testimony presented at trial indicated that Allen and his wife had previously made death threats against each other. Two witnesses testified that several days before the shooting, Mrs. Allen attacked her husband with a steak knife then a bottle.

II.

Petitioner contends that the prosecution's attempt to impeach his testimony by his prior silence violated the Fourteenth Amendment; he relies principally on *Doyle v. Ohio*, 426 U.S. 610 (1976). The State asserts that the Supreme Court's decision in *Jenkins v. Anderson*, 447 U.S. 231 (1980), controls this case.

A. Post-Arrest Silence

In *Doyle v. Ohio*, 426 U.S. 610 (1976), petitioners at their trial told an exculpatory story they had not told before to the police or prosecutor. On cross-examination, the prosecutor questioned them about their failure to give the explanation to police at the time of their arrest. The Court held that the use of petitioner's post-arrest silence for impeachment purposes violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619. The Court stated:

> Silence in the wake of these [*Miranda*] warnings may be nothing more than the arrestee's exercise of these ... rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.... Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18.

The district court found, and we agree, that the prosecutor's questions during cross-examination and remarks in closing arguments violated petitioner's due process rights. The State may not use a criminal defendant's silence after he has

been given the *Miranda* warnings to impeach an exculpatory story brought forth later. To permit such a practice would be fundamentally unfair, as the Supreme Court found in *Doyle*, and would be too great a burden on a criminal defendant's exercise of his right to remain silent. Moreover, we agree with the district court that petitioner's silence was not necessarily inconsistent with his claim of self-defense. *See United States v. Hale*, 422 U.S. 171, 176 (1975).[1]

B. Pre-Arrest Silence

In *Jenkins*, petitioner testified at his trial for murder that he acted in self-defense. He was not arrested until two weeks after the slaying. The prosecutor cross-examined petitioner about his silence during the period before his arrest, attempting to impeach his testimony by showing that he would have spoken up sooner if he had in fact acted in self-defense. The Supreme Court held that the use of pre-arrest silence to impeach a criminal defendant's credibility does not violate the Fifth or Fourteenth Amendments. 447 U.S. at 238, 240.

We find that *Jenkins* does control the pre-arrest silence issue; if the prosecutor's questions on cross-examination and remarks in closing arguments had referred only to petitioner's silence prior to receiving his *Miranda* warnings, we would have been bound by *Jenkins* to conclude that no constitu-

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[1] The Court in *Hale*, although basing its decision on its supervisory power over federal courts rather than on consitutional grounds, noted that "[i]n most circumstances, silence is so ambiguous that it is of little probative force." 422 U.S. at 176. The Court found that the respondent in that case had been given the *Miranda* warnings and that, therefore, "his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication." *Id.* at 177.

tional violation occurred. In the case at bar, however, the prosecutor's remarks were phrased broadly, without distinguishing between pre-and post-arrest silence.[2] Therefore, the fact that the questions may have permissibly referred in part to the pre-arrest silence does not alter the conclusion that the references to post-arrest silence were unconstitutional.

III.

The State argues that despite the fact that the prosecutor's questions referred impermissibly to post-arrest silence, we should affirm the conviction because the error was harmless. We cannot agree.

A constitutional error will not be found harmless unless the court determines that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).[3] "[U]nless there is a reasonable probability that the improperly admitted [questions] contributed to the conviction, reversal is not required." *Schneble v. Florida*, 405 U.S. 427, 432 (1972).

In the case at bar, it is possible that a juror might have considered the prosecutor's remarks about petitioner's silence in rejecting his self-defense claim. Further, petitioner's assertion of self-defense was not frivolous; he presented other witnesses who testified about prior attacks and threats against peti-

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[2] In its brief, the State concedes that "the prosecutor in cross-examining the defendant did not always phrase his questions concerning defendant's failure to tell his self-defense story in such a way that they clearly referred only to the period before his arrest. . . . Yet this should not be fatal to the defendant's conviction because the prosecutor was clearly adverting to the defendant's state of mind before his arrest. . . ." We disagree; it is clear from the questions that the prosecutor was referring to both petitioner's pre- and post-arrest silence.

[3] The Court in *Doyle* did not consider whether the error in that case was harmless because the State failed to raise the issue. 426 U.S. at 619-20.

tioner by his wife. Therefore, we cannot conclude that the error was harmless beyond a reasonable doubt.[4]

Accordingly, we affirm the decision of the district court.

PELL, *Circuit Judge*, dissenting. I was a member of the original panel which unanimously affirmed the district court's grant of habeas corpus and adopted the opinion of the district court as the decision of this court. Under *Doyle v. Ohio*, 426 U.S. 610 (1976), the result seemed clear. This is not true, however, now that we reconsider our judgment in the light of *Jenkins v. Anderson*, 447 U.S. 231 (1980), as we have been mandated to do by the Supreme Court. In my opinion the facts in this case, upon consideration in the light of *Jenkins* require a reversal of the district court's grant of habeas corpus. I therefore respectfully dissent.

When the case was originally before us, under *Doyle* I entertained the idea that we could not properly say under *Chapman v. California*, 386 U.S. 18 (1967), that the error was harmless. Now the situation under *Jenkins* is different and I regard whatever minimal error remains in the prosecutor's conduct would properly be considered as harmless error.

The majority in *Doyle* made an express point of the fact that the state was not claiming in the circumstances of that case that the use of the silence for impeachment might have been harmless error. On the assumption that our high court did not needlessly insert superfluous language I take this reference as an indication that, as in any case of a constitutional error, such error may be harmless, dependent upon the circumstances of the particular case. I will refer to those circumstances later.

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[4] We note further that the district judge, who heard the testimony and closing arguments, ruled that the error was not harmless.

It must be kept in mind that under *Jenkins*, if this old case should now be retried, assuming that the Moores and the police officer are still living and are available as witnesses, the prosecution will be free to comment on pre-arrest silence. I feel confident that the prosecution will do so. The jury will know that when the police officer, Melloy, arrived at the scene, Allen did talk to him before a *Miranda* warning was given, and told him that he had shot his wife and that she was hurt "pretty bad," and that he did not say anything about having acted in his own defense. The prosecutor would be perfectly free under *Jenkins* to make comments during final argument to the effect that the natural thing would have been when the officer arrived for Allen to have told the officer that his wife had been after him with a knife and that he had to shoot her. We would not expect him to use terms of art, or that he would tell the policeman *in haec verba* that he was engaged in self defense, but on the other hand it would be wholly natural and probable if he in fact had been defending himself he would have made some minimal reference to the actual facts of self defense such as, "she came lunging at me with a butcher knife."

Unfortunately, in the case under review while all of the focus was on the initial contact with Officer Melloy and the conversation that did occur, all of which was before the *Miranda* warning, the prosecutor's questions could be considered sufficiently broad to include the post-*Miranda* period. In reading the transcript one cannot conceive, however, that the jury's real attention was directed other than at the silence at the time of the first contact by Officer Melloy when it would have been natural for Allen to have blurted out that his wife was after him with a knife. This is similar to the old *res gestae* situation on the admission of excited utterances. His silence after the *Miranda* warning would not have been surprising to the jury.

In *Jenkins* the majority opinion referred to the common law which "traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970)." 447 U.S. at 239.

Turning now to the evidence in this case, I do note that there is a possibility of some conflicting evidence on the question of self defense but upon analysis this strikes me as so meager as to make the claim frivolous. It is based principally upon Allen's own testimony and its only objective fortification is that a few days earlier there had been an incident in which the wife had grabbed a steak knife and at that time and subsequently had made some threats against the defendant. Looking at the incident in question, however, both the testimony of the only living eyewitness other than Allen and the clear conclusions to be drawn from the physical facts completely negate self defense. Without going into detail, the district court's opinion beginning at page four summarizes the factual situation. I note particularly that Allen shot his wife five times with a handgun, significantly inconsistent with self defense, and then tried to shoot her once more as she was lying on the floor. The gun was empty so the corpse was spared an extra round. Allen testified that his wife first attacked him with a butcher knife and that she was injured during that attack. The eyewitness, however, testified that she did not own a butcher knife and did not see a knife on the floor in the kitchen or in the living room. The eyewitness, Mrs. Moore, was Mrs. Allen's sister-in-law, and one could raise a question as to the objectivity of such a witness. I note, however, that both Mrs. Moore and her husband as defense witnesses, candidly testified as to the threats Mrs. Allen had made against her husband and also as to the steak knife incident. Further, as previously noted, Allen was calm when he talked to Officer Melloy.

The overall evidence to which I have adverted previously presents a powerful case of guilt and it would be indeed a strange jury that would find the claim of self defense on this evidence other than frivolous.

While I think we could reverse on harmless error for the reasons outlined in the evidence of the trial, certainly with the addition of the evidence permitted by *Jenkins* that Allen did not mention self defense in circumstances in which that fact would naturally be asserted, to wit, at the time the police officer first arrived and Allen was vocal, the guilt was overpowering and the meager, non-specific references to post-*Miranda* silence are harmless error. Finally, in considering this case under *Jenkins*, we should do so on the basis that what the jury heard in the first trial as to the failure to claim self defense up to the time of the *Miranda* warning was proper for it to hear. Insofar as there was evidence of non-proclaiming at a time subsequent to the *Miranda* warning this was merely cumulative.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In The
United States Court of Appeals
For The Seventh Circuit

Chicago, Illinois 60604

November 19, 1981.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. DONALD P. LAY, Chief Judge**
Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA ex. rel. EDDIE ALLEN, Petitioner-Appellee, vs. GAYLE M. FRANZEN, etc., et al., Respondents-Appellants.	Appeal from the United States District Court for the Southern District of Illinois Peoria Division
No. 78-2140	No. 78-C-1016
	ROBERT D. MORGAN, Judge

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by respondents-appellants, a vote of the active members of the

court was requested, and a majority of the active members have not voted to grant a rehearing en banc.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Circuit Judges Pell, Sprecher, and Bauer voted to grant the petition for rehearing en banc.

** Chief Judge Donald P. Lay, of the Eighth Circuit Court of Appeals, sat with this court by designation.